A

CENTRAL HOLDINGS MANAGEMENT SERVICES SDN BHD

v.

B

MUHAMMAD ZAILANI MAT ZIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[CIVIL APPEAL NO. R1-16-18-2003]
29 MARCH 2006

C

LABOUR LAW: *Employment - Retrenchment - Labour department, complaints and inquiries - Underpaid retrenchment benefits - Allegation of - Decision of labour officer ordering appellant to pay respondents a sum of RM651,607.51 - Employment Act 1955, ss. 69 & 70 - Whether*

D *breached - Whether findings of labour officer unsupported by evidence*

This was an appeal by the appellant against the decision of the assistant director general of labour ('labour officer') ordering the appellant to pay the respondents a total sum of RM651,607.51

E being the underpaid retrenchment benefits due to the respondents under a collective agreement. The respondents were former employees of Hotel Holiday Inn On The Park ('the hotel') which was managed by the appellant. Following the closure of the hotel, the respondents were retrenched. However, according to the

F respondents there was a shortfall in the retrenchment benefits as the appellant had failed to include service charges as part of wages in the computation of the retrenchment benefits. The respondents thereafter filed a claim at the labour department under s. 69 of the Employment Act 1955 ('the Act'). The labour

G officer handed down her decision ordering the appellant to pay the respondents the said sum. It was the contention of the appellant herein that the labour officer was in breach of s. 69 and 70 of the Act when she proceeded to hand down her decision without examining any of the respondents on oath in an *inter parte* hearing

H to substantiate the respondents' claims. The issue that arose was whether there was a concession by the applicant to dispense the requirement of examining the witnesses or the necessity to adduce evidence to substantiate the respondents' claim.

Held (allowing the appeal):

I

(1) There was no clear statement from the appellant to indicate it had made an application or agreed to waive its right to an *inter parte* hearing. Even if the parties had mutually agreed to

allow the labour officer to hear the matter without hearing oral evidence, it would not have conferred the labour officer with the jurisdiction to decide on the amount as claimed by the respondents as this was contrary to the mandatory provisions of ss. 69 and 70 of the Act. (paras 10 & 11)

(2) Actual proceeding to hear oral evidence had not taken place here. The labour officer came to a decision without calling any witnesses of the appellant or the respondents. There was no evidence as to how the sum of RM651,607.51 was arrived at. No oral evidence of the respondents had ever been heard or taken down by the labour officer. Thus the findings of the labour officer was unsupported by evidence. (para 15)

(3) The labour officer, after determining the preliminary issue that service charges were part of wages, should not have immediately ordered the appellant to pay the sums as claimed by the respondents. She would have to inquire whether the computation in respect of the shortfall as done by the respondents were correct and proven. This court made a further order that the matter be sent back to the labour officer for her to determine the alleged shortfall in the retrenchment benefits and this must be done in accordance to s. 70 of the Act. (para 16)

Case(s) referred to:

Ahmani Sdn Bhd v. Abu Karim Baharom & Ors [2000] 2 CLJ 625 HC ***(refd)***

Federal Hotel Sdn Bhd v. National Union of Hotel Bar & Restaurant Workers [1983] 1 CLJ 67; [1983] CLJ (Rep) 150 FC ***(refd)***

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. GB Kuari Sdn Bhd & Anor [2003] 2 AMR 363 ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ram Singh v. Bright Steel Sdn Bhd [1988] 2 CLJ 16; [1988] 1 CLJ (Rep) 272 SC ***(refd)***

Legislation referred to:

Employment Act 1955, ss. 69, 70

For the appellant - N Sivabalah (Raymond TC Low with him); M/s Shearn Delamore & Co

For the respondent - James Khong; M/s Sreenevasan

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif J:

[1] This is an appeal by Central Holdings Management Services Sdn. Bhd. ("the appellant") against the decision of the Assistant Director General of Labour ("labour officer") dated 29 October 2003, ordering the appellant to pay the respondents, a total sum of RM651,607.51 of being the underpaid retrenchment benefits due to the respondents under a collective agreement.

[2] The respondents were former employees of Hotel Holiday Inn On The Park ("the hotel"). The hotel was managed by the appellant. Following the closure of the hotel, the respondents were retrenched. They were paid retrenchment benefits. However, according to the respondents there was a shortfall in the retrenchment benefits as the appellant had failed to include service charges as part of wages in the computation of the retrenchment benefits.

[3] The respondents thereafter filed a claim at the Labour Department under s. 69 of the Employment Act 1955 ("the Act") for a collective sum of RM651,607.51 arising from an alleged shortfall in the retrenchment benefits. The claim was filed by one Muhammad Zailani bin Mat Zin on 11 September 1999 on behalf of the respondents.

[4] The summon was thereafter issued by the labour officer to the appellant, giving notice requiring the appellant to attend a meeting on 11 November 1999 to answer the complaint lodged by the respondents. On 11 November 1999, the appellant's representative attended the meeting. The chief complainant, Encik Muhammad Zailani who filed the claim on behalf of the respondents and his union representative also attended the meeting. As the dispute could not be resolved, the labour officer fixed a new date on 29 January 2000 to enable the appellant to consider the respondents' claim.

[5] On 29 January 2000, the appellant informed the labour ooffice that it had appointed a firm of solicitors to represent them. Both parties were then directed to provide the labour officer with a sample on the computation of the retrenchment benefits. The case was then adjourned. When the matter was called up on 27 November 2000, the appellant's counsel applied for the case to be adjourned pending the disposal of the case of *Equatorial Hotel v.*

Thomas George before the Court of Appeal on the issue whether service charges should be included as part of wages. The labour officer however rejected the counsel's application and directed the parties to proceed with the hearing and further directed the parties to file their written submissions.

[6] On 23 April 2001, written submissions for both parties were submitted before the labour officer. On 29 October 2003, the labour officer handed down her decision ordering the appellant to pay the respondents the sum of RM651,607.51. Hence, this appeal by the appellant.

[7] Before me, it is the contention of the appellant that the labour officer was in breach of ss. 69 and 70 of the Act when she proceeded to hand down her decision without examining any of the respondents on oath in an *inter parte* hearing to substantiate the respondents' claims. According to the appellant there was a total failure to comply with the mandatory provisions of ss. 69 and 70 of the Act as the labour officer merely received the complaints and called the matter for discussion but without fixing a date for the purpose of examining the respondents on oath. According to the appellant whatever hearing before the labour officer was a hearing on the preliminary issue whether service charges should be included as part of wages. It is the contention of the appellant that no actual hearing as stipulated by s. 70 of the Act was ever conducted by the labour officer.

[8] The respondents conceded that under s. 70 of the Act, an examination of the respondents and details of their respective claims are necessary, but submitted that this was not done in this case because the appellant had made an application to the labour officer to dispense with the requirement of calling witnesses or the necessity of adducing evidence to substantiate the respondents' claims. To support their contention, the respondents reproduced the relevant portions of the note of proceedings which reads:

> 3.3.2004 ...
>
> ... Isu ke atas pengiraan tidak dipertikaikan. Yang dipertikaikan adalah layak untuk service charge ...
>
> 27.11.2000 ...
>
> Facts of case/point of law is not disputed. Both parties would like to go on submission. The difference is that the payment of service charge is not counted in the termination benefits. Whether

A service charge is part/element of wages or not. If it is wages it should be included in termination benefits ...

Kedua-dua pihak mohon untuk memberi submissions bertulis tanpa memberi keterangan saksi ...

B **[9]** Based on the aforesaid, it is the contention of the respondents that the appellant not only conceded to the respondents' calculation of the retrenchment benefits but had also made an application to the labour officer to dispense with the requirement of calling evidence or witnesses. Thus, according to C the respondents, the appellant's contention that the labour officer had erred in law or acted out of jurisdiction is devoid of merit.

[10] Thus, the crucial issue before me is whether there was a concession by the applicant to dispense the requirement of D examining the witnesses or the necessity to adduce evidence to substantiate the respondents' claim. With respect, I am unable to hold as such. To me, there seem to be a confusion with what was agreed between the parties. Looking at the record, there is no clear statement from the appellant to indicate it had made an E application or agreed to waive its right to an *inter parte* hearing.

[11] Further, I am of the view that even if the parties had mutually agreed to allow the labour officer to hear the matter without hearing oral evidence, it would not have conferred the F labour officer with the jurisdiction to decide on the amount as claimed by the respondents as this would be contrary to the mandatory provisions of s. 69 and s. 70 of the Act. It is trite law that consent does not confer upon a court or tribunal jurisdiction to act outside its scope of it powers. In *Federal Hotel Sdn Bhd v. National Union of Hotel Bar & Restaurant Workers* [1983] 1 CLJ 67; G [1983] CLJ (Rep) 150 Abdoocader J (as he then was) held the following:

> It is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any H power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction (*Essex Country Council v. Essex Incorporated Congregational Church Union* (at pp 820-821 per Lord Reid).

I **[12]** The aforesaid decision was recently followed in *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. GB Kuari Sdn Bhd & Anor* [2003] 2 AMR 363. Hence, in this case even if the

appellant had failed to object to the labour officer unilateral decision to hear the matter without oral evidence but merely on the strength of written submission, such acquiescence did not empower the labour officer to decide over the matter by ignoring s. 70 of the Act. To me, s. 70 clearly mandates the labour officer to take and hear evidence on oath. For the sake of clarity the relevant provisions of s. 70 is hereby reproduced:

70. Procedure in Director General's inquiry.

The procedure for disposing of questions arising under sections 69, 69B and 69C shall be as follows:

(a) the person complaining shall present to the Director General a written statement of his complaint and of the remedy which he seeks or he shall in person make a statement on the Director General of his complaint and of the remedy he seeks;

(b) the Director General shall as soon as practicable thereafter examine the complaint on oath or affirmation and shall record the substance of the complaint's statement in his case book;

(c) the Director General may make such inquiry as he deems necessary to satisfy himself that the complaint discloses matters which in his opinion ought to be inquired into and may summon in the prescribed form the person complained against, of it is appears to him without any inquiry that the complaint discloses matters which ought to be inquired into, he may forthwith summon the person complained against;

(d) when issuing a summons to a person complained against the Director General shall give such person notice of the nature of the complaint made against him and the name of the complainant and shall inform him of the date, time and place at which he is required to attend and shall inform him that he may bring with him any witnesses he may wish to call on his behalf and that he may apply to the Director General for summonses to such persons to appear as witnesses on his behalf;

(e) when the Director General issues a summons to a person complained against he shall inform the complainant of the date, time and place mentioned therein and shall instruct the complainant to bring with him any witnesses he may wish to call on his behalf and may, on the request of the complainant and subject to any conditions as he may deem fit to impose, issue summonses to such witnesses to appear on behalf of the complainant;

A (f) ...

(g) the Director General shall, at the time and place appointed, examine on oath or affirmation those persons summoned or otherwise present whose evidence he deems material to the matters in issue and shall then give his decision on the B matters in issue;

(h) ...

(i) in order to enable a court to enforce the decision of the Director General, the Director General shall embody his C decision in an order in such form as may be prescribed.

[13] To me, the above provisions of s. 70 are mandatory. It is trite law that failure to comply with such mandatory provisions would render a decision a nullity. In *Ahmani Sdn Bhd v. Abu* D *Karim Baharom & Ors* [2000] 2 CLJ 625 the High Court held:

> From the wording and the flow of the procedural sequence set out in s. 70 of the Employment Act 1955, it is clear and unambiguous that before any summons in the prescribed form is issued against the party complained, the Director General must E examine the complainant on oath or affirmation.

[14] In *Ram Singh v. Bright Steel Sdn Bhd* [1988] 2 CLJ 16; [1988] 1 CLJ (Rep) 272, the Supreme Court set aside a decision of the labour officer on the basis that it had acted on no evidence F and contrary to hearsay rule. Lee Hun Hoe CJ (Sabah, Sarawak) held the following:

> While we appreciate that the proceedings before the labour officer were rather informal, nevertheless we expect the labour officer to act fairly, justly and impartially. The way he dealt with the matter G made him appear to be a crusader rather that acting judicially. No reasonable tribunal would find that the appellant worked for 20 hours a day for nine years on the evidence before the tribunal.
>
> Even though the procedure is informal, it is inconceivable that the labour officer would act on hearsay evidence. The application of H the principle of natural justice does not mean that the labour officer could act on what is not evidence. It is, therefore, not surprising that the learned judge found that the evidence before the labour officer was unsatisfactory.
>
> I One is reminded of the words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 (at p 178):

> On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: "This is what I have lost; I ask you to give me these damages." They have to prove it. The evidence in this case with regard to damages is extremely unsatisfactory.
>
> This was what happened to the present case. The learned judge had found the evidence unsatisfactory. We agree with him. On the evidence, we have no doubt whatsoever that the appellant had not proved this case on the balance of probabilities. We see no reason to interfere with the learned judge's finding. We dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

[15] In the present case, actual proceeding to hear oral evidence has never taken place. The labour officer came to a decision without calling any witnesses of the appellant or the respondents. In *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, the Federal Court held that a decision of a tribunal could be set aside if there is no evidence to support the findings of the tribunal. In the present case there is no evidence as to how the sum of RM651,607.51 was arrived at. No oral evidence of the respondents had ever been heard or taken down by the labour officer. Thus, the findings of the labour officer is unsupported by evidence.

[16] It is for the above reasons that the order of the labour officer ordering the appellant to pay the respondents in the sum of RM651,607.51 was set-aside. To me, the labour officer, after determining the preliminary issue that service charges are part of wages, should not have immediately ordered the appellant to pay the sums as claimed by the respondents. She would have to inquire whether the computation in respect of the shortfall as done by the respondents were correct and proven. In the circumstances, I made a further order that the matter be sent back to the labour officer for her to determine the alleged shortfall in the retrenchment benefits and this must be done in accordance to s. 70 of the Act.

[17] The appellant's appeal was therefore allowed as stated above with costs.